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IN THE

Supreme Court of the United States

October Term, 1966
No. 253

MICHAEL ALLAN McCOWAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner, Michael Allan McCowan, respectfully prays for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review its judgment affirming a judgment of the United States District Court for the Southern District of California, *i.e.*, affirming a conviction of violations of Sections 1702 and 1708 of Title 18 U.S.C.

Opinions Below.

No opinion was written by the trial court. Trial was by jury.

The opinion of the Circuit Court is reported commencing at page 78 of Volume One of the record before the Circuit Court.[1] The record has been lodged with

[1]The record is five volumes, Volume One being the record of the proceedings before the Circuit Court, the other volumes

(This footnote is continued on the next page)

the Clerk of this Court. A copy of the opinion of the Circuit Court is attached hereto as Appendix "A".

Grounds on Which the Jurisdiction of This Court Is Invoked.

1. The date of the judgment sought to be reviewed is April 4, 1967 [C. T. p. 83]. The time of its entry is the same.

2. A petition for rehearing was timely filed by petitioner McCowan on May 4, 1967, and was denied on May 9, 1967 [C. T. p. 84]. A petition was duly filed with this Court for an extension of time within which to petition for certiorari.

3. The statutory provisions believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari are 28 U.S.C. 1254(1) and 2101(c) and Rule 22(c) of this Court.

Pleadings in the Trial Court.

Count One Charged:

> "On or about October 21, 1964, in Los Angeles County, within the Central Division of the Southern District of California, defendant MICHAEL ALLAN McCOWAN, by fraud and deception, obtained from the Van Nuys, California Main Post Office a package addressed to Joan Ansel, Colonial Manor Motel, Rockville, Maryland."

Count Two charged:

> "On or about October 21, 1964, in Los Angeles County, within the Central Division of the South-

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being the record before the District Court. We will hereafter refer to the Clerk's Transcript as C. T. and the Official Court Reporter's Transcript as R. T.

ern District of California, defendant MICHAEL A. McCOWAN opened a package addressed to Joan Ansel, Colonial Manor Motel, Rockville, Maryland, with design to obstruct the correspondence of and before being delivered to the addressee, which said package theretofore had been in the Van Nuys, California Main Post Office."

Statutes Involved.

The defendant-appellant, petitioner herein, is being prosecuted under Sections 1702 and 1708 of Title 18 U.S.C., which provide in pertinent part:

18 U.S.C. 1702:

"Whoever takes any letter, postal card, or package out of any post office or any authorized depository for mail matter, or from any letter or mail carrier, or which has been in any post office or authorized depository, or in the custody of any letter or mail carrier, before it has been delivered to the person to whom it was directed, with design to obstruct the correspondence, or to pry into the business or secrets of another, or opens, secretes, embezzles, or destroys the same, shall be fined not more than $2,000 or imprisoned not more than five years, or both."

18 U.S.C. 1708:

"Whoever steals, takes . . . or by fraud or deception obtains . . . from or out of any mail, post office, or station thereof . . . any letter, postal card, package . . . shall be fined not more than $2,000 or imprisoned not more than five years, or both."

Constitutional Provisions Involved.

The Fifth Amendment to the United States Constitution provides in pertinent part:

> ". . . [N]or shall any person be deprived of life, liberty or property, without due process of law; . . ."

Questions Presented for Review.

1. Whether, as we contend, the trial court erred in denying the motions for judgment of acquittal? The evidence was not sufficient to sustain the trial judgment on both counts or either count.

Ancillary to this, and controlling, we respectfully urge that the court had no jurisdiction to try this case. McCowan was a sender, and when the package was returned to him, the postal authorities and the United States District Court lost jurisdiction to try McCowan.

2. Whether, as we contend, the United States Attorney was guilty of misconduct in the course of cross-examination of a character witness of the defendant-appellant—such as could not be cured by an instruction to disregard the same, as given by the court?

3. Whether, as we contend, the following incidents denied defendant-appellant a fair trial, as guaranteed by the Constitution:

A. The new indictment after the mistrial,[2] switching the allegations and doing so to encom-

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[2]The defendant had been previously charged in Case No. 34508 (United States District Court for the Southern District of California, Central Division), and upon disagreement of the jury (they were unable to reach a verdict) the matter was declared a mistrial and set for further trial. Case No. 34508 was eventually dismissed.

pass the testimony developed in the first trial (See Motion to Dismiss—Clerk's Transcript).

B. The question put to one character witness and sought to be presented to the numerous character witnesses.

C. The questions put to the defendant-appellant about his legal education.

D. The questions about defendant-appellant's intimacy with the government's female witness.

Statement of the Case.

We contend that since Sections 1702 and 1708 of Title 18 U.S.C. do not apply to this case, the trial court lacked jurisdiction to try and convict the petitioner herein.

Facts.

Michael McCowan testified: He had been a police officer for the City of Los Angeles for about ten years. He became acquainted with two sisters, Jean Ortiz and Joan Ansel or Joan Christensen. He told Joan Ansel that he was a policeman, and Joan Ansel told him that her husband had been one of the ten most wanted men by the F.B.I. [R. T. 129-139]; she asked him to make inquiry about her husband, where he was, that he had been picked up for robbery and was involved in robberies in Maryland. He reported this information to Sgt. Long of the robbery detail of the Los Angeles Detective Bureau. After this he saw the girls from time to time. Joan Ansel told him that she had been involved in robberies with her husband, that she had driven the get-away car. He had reported these matters to Sgt. Long of robbery

[R. T. pp. 193-198]. Joan Ansel left certain property with him for safekeeping, fur coats, diamond rings, and rifles [R. T. pp. 200-202]. Exhibit A was a photograph of the rifles and guns, and in the left-hand corner of Exhibit A there was a medical kit which Joan Ansel said she has used to remove a bullet from her husband's leg [R. T. pp. 202-205]. He reported this to Sgt. Long [R. T. pp. 206-207]. He moved some of this to his father's home [his mother and father testified they had seen the articles]. Joan Ansel told him that she was going to Baltimore, that she had a prearranged plan and intended to help her husband break out of jail [R. T. pp. 208-210]. Later he met Jean Ortiz and she said that her sister wanted to get the fur coats and diamond rings back, that her sister Joan was a vicious person [R. T. pp. 210-211]. Some time later Jean Ortiz said that she was going to sell the fur coats and send the diamond rings back to her sister Joan. He and Jean Ortiz prepared two packages. The diamond rings were placed in a package and there was a second package. He wrapped the package with the diamond rings. Jean Ortiz was present. They did not have enough wrapping material, so they had not gone to the post office that evening. He had gone to the post office to check about recovering a package and was informed how to do it. Jean Ortiz said that she was desperate for money and was going to sell the fur coats and the diamond rings. Her sister had said, "Go ahead and sell them out there. I am in need of money too. Take what money you need for

your husband's defense [Jean Ortiz's husband had been arrested for robbery] and send the rest to me." Jean Ortiz then gave him the diamonds [R. T. pp. 218-219]. He had told the man at the post office that he was a policeman and was engaged in an investigation, that there was going to be a package mailed and that he did not know the contents of the box but that it was about the size of a "hyp" kit and he thought it might possibly contain narcotics, that he had worked his way in with two females, and that he would like to retrieve the package from the mails. The postal employee told him that if his name was on it as sender he would be able to retrieve it if he could identify it and if he signed a piece of paper stating that he had received it from the postal service, so that the postal inspectors would know where the package went [R. T. p. 220]. The package was taken to the post office, and while being wrapped, to get extra paper, they went to the police department and he looked for the detectives in the squad room [R. T. p. 220]. None of the detectives were present. He and Jean Ortiz finished wrapping the package. His name was put on as the sender. The return address was the post office box belonging, he believed, to Joan Ansel in Van Nuys. The package was presented to the clerk at the post office. He and Jean were standing directly together. He did not recall who actually handed the package to the clerk. He gave Jean the money for the postage [R. T. pp. 221-222]. The diamonds were not in that package. The diamonds

were in his pocket. He later returned to the post office and obtained the package from a Mr. Gledhill. He signed a document there. Mr. Gledhill filled in a portion of it [R. T. p. 223]. He did not take the property with the intent to appropriate it to his own use. He put the package in his police station locker [R. T. pp. 223-224]. He showed the package the next morning to one of the detectives, Sgt. Long. The package was opened and they found inside a license which bore a name used by Joan Ansel's husband as an alias and some other papers. He did not give the package back because he felt if the girls got it, the material contained therein would be used in connection with a jail break [R. T. pp. 225-226]. He showed Sgt. O'Grady of the police department the diamonds. O'Grady sent him to Brooks Runyon [R. T. pp. 227-228]. Runyon sold the diamonds and gave him the money, $1100 [R. T. pp. 228-229].

ARGUMENT AMPLIFYING GRANTING THE WRIT.

I.

The Court Erred in Holding That the Evidence Was Sufficient for the Jury to Find That McCowan "Was Neither the Sender nor the Sender's Agent" and That "Federal Protection Over This Mail Extended Not Only to the Obtaining of the Package From the Post Office but to McCowan's Subsequent Act of Opening the Package Before It Had Been Delivered to the Addressee."

We respectfully urge that under the facts, such conclusion is not sustained by the law and the cases cited. *United States v. Dogwood* (7th Cir.), 360 F. 2d 905, 908, we urge, is in our favor and enumerates postal custody and receptacles covered by the law. No such situation as shown in the *McCowan* case is made a federal offense. The court, therefore, lacked jurisdiction. Remember: McCowan went to the post office with the sister—Jean Ortiz, together the package was mailed. The rings were entrusted to McCowan by Joan Ansel, and he would be answerable to her as agent or bailee. We again urge this law was not intended to cover the situation here depicted. In *United States v. Dogwood, supra,* the court said:

> "The record fully establishes that the defendant stole Walley's driver's license and therefore possessed it with the knowledge that it was stolen. But the evidence, although viewed in a light most favorable to the government merely shows that the

defendant stole the license after the letter from which he abstracted it had been delivered to his mother, the landlady, who received or collected the mail for her tenants. But Sec. 1708 in defining the offenses it interdicts enumerates the postal custody, mail receptacles, and 'other authorized depository' for mail matter . . ."

See also:

United States v. Dogwood, supra, 360 F. 2d 905, 908;

United States v. Bullington, 170 Fed. 121;

United States v. Stafford, 66 Fed. 942.

II.

The United States Attorney Was Guilty of Misconduct in the Course of Cross-Examination of a Character Witness of Defendant-Appellant—Such as Could Not Be Cured by an Instruction to Disregard the Same, as Given by the Court.

Mr. Ira Reiner, Deputy City Attorney of Los Angeles, testified on behalf of defendant-appellant McCowan and, among other things, stated that he knew McCowan's reputation for truth and honesty in the community in which he resided and did business and that his [McCowan's] reputation for those qualities was excellent [R. T. p. 300]. On cross-examination, the Assistant United States Attorney asked:

> "Have you heard that Mr. McCowan passed worthless checks in the sum of $12,568.00, and that as a result of this it was a major factor in a man losing his business?" [R. T. p. 301].

Objection was immediately made [R. T. p. 301]. Thereupon there was discussion between court and counsel, some of it beyond the hearing of the jury, at the side bar [R. T. pp. 302-305]. The court then instructed the jury to disregard the question asked by counsel [R. T. pp. 305-306]:

> "The Court: Ladies and gentlemen of the jury, when the court makes a ruling on a matter you are not to speculate as to why the court has made the ruling, nor what might have been offered if the court had not made a ruling.
>
> "In the trial of a case—and in particular a criminal case—the court should try to see to it that the issues are made as simple as possible so that the jury, when it has the case to decide on guilt or innocence, should be able to decide without confusion and without collateral issues. And if we get off into the trial of collateral issues it sometimes has a tendency to confuse the jury.
>
> "For that reason I am taking my prerogative at this time and not allowing the testimony which was offered. And you are to disregard the question asked by counsel, to give it no—give it no consideration whatsoever. It is not to be considered by you in determining this case. Just try to, as near as you can, make it so that you never heard that statement. You must not consider that question and the attempted answer."

With the next witness, the Assistant United States Attorney was about to pursue the same question and

asked the court if he was precluded from so doing [R. T. pp. 309-310]:

"Mr. Miller: Am I to understand that I am to be precluded from going into this area that we discussed before as to all these character witnesses they are going to put on?

"The Court: I don't know how much plainer I could have made it. I don't know how much plainer I could have made it, if I had written it out and put it on the wall it couldn't have been plainer. I don't know how you could ask that question.

"Mr. Parsons: I ask the court, please, to instruct the jury to disregard that.

"The Court: All right. I was trying to divert the jury's attention away from that entirely, and the jury again is instructed to completely disregard the question and any reference to that matter, they are not to consider it at all in considering the guilt or innocence of this defendant in this case.

"I made a ruling and the ruling stands, as to that witness, and as to all witnesses that are called at a later time—no matter who they may be."

We contend that this was in violation of the rule laid down in *Vierick v. United States*, 318 U.S. 236, 248, quoting *Berger v. United States*, 295 U.S. 78, 88:

"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to gov-

> ern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

With all due respect to the learned trial judge, the instruction to the jury to disregard could not, and apparently did not, overcome the prejudicial effects of the question.[3]

As was said in *Krulewitch v. United States*, 336 U.S. 440:

> ". . . The naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction. (Citing cases)".

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[3]The Circuit Court reasons such questions were proper. However, the trial court felt the questions should not be asked, and notwithstanding such a ruling, the Assistant United States Attorney persisted, thus emphasizing the damage already done. Defendant-petitioner called several character witnsses who testified to the good reputation of McCowan: Ira Reiner, Deputy City Attorney of Los Angeles [R. T. p. 297]; Gerard Vaccaro, a Los Angeles Times dealer [R. T. p. 309]; Rosemary Gruenwald, Deputy Attorney General of the State of California [R. T. p. 312]; Earl Osadchey, a special assistant lawyer on the staff of the District Attorney of Los Angeles County [R. T. p. 334]: David V. Stanton, a retired Los Angeles

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Conclusion.

For the reasons stated, we respectfully ask that the petition for writ of certiorari should be granted.

Respectfully submitted,

RUSSELL E. PARSONS,
Attorney for Petitioner
Michael Allan McCowan.

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police sergeant [R. T. p. 337]—McCowan also discussed the package with him [R. T. pp. 338-339]; John E. O'Grady, a Los Angeles police officer [R. T. p. 346]; Patrick Long, a Los Angeles Police officer [R. T. p. 366]; Pat Kealy, a Los Angeles police officer [R. T. p. 371]; and George E. O'Nan, a Los Angeles police officer [R. T. p. 373].